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Recovery of misappropriated funds from staff members and former staff members

Report of the Secretary-General

I. INTRODUCTION

1. In paragraph 13 of its resolution 47/211 of 23 December 1992, the General Assembly requested the Secretary-General to make proposals to the Assembly on:

> "(a) Establishing legal and effective mechanisms to recover misappropriated funds, as recommended by the Advisory Committee on Administrative and Budgetary Questions in paragraph 53 of its report; 1/
>
> "(b) Seeking criminal prosecution of those who have committed fraud against the Organization."

2. The Advisory Committee on Administrative and Budgetary Questions, in paragraph 53 of its report, 1/ stated:

> "53. Cases of fraud and presumptive fraud have been reported by the Board in paragraphs 355 to 368 of its report, as well as in paragraph 126, with regard to an incident of misappropriation of funds in ECA amounting to approximately $125,000. The Committee notes that, in quite a few cases, efforts towards recovery of misappropriated funds or other losses to the Organization have either been negligible or unsuccessful, due in some cases to the individual having left the jurisdiction of the United Nations. In view of this, the Advisory Committee suggests that the Administration, with the assistance of the Legal Counsel, explore the possibility of establishing a mechanism by which agreements or arrangements between the United Nations and all Member States could be reached. The objective would be to enable the Organization to pursue the prosecution of individuals for

embezzlement of funds and to seek redress and recovery of misappropriated funds. The feasibility of recovery from the pension benefits of the individuals concerned should also be explored."

3. The present report is submitted in response to that request.

II. CURRENT PRACTICE

A. Internal action

1. Recovery from accrued salary and emoluments

4. Under the provisions of staff rule 103.18 (b) (ii), deductions from salaries, wages and other emoluments may be made for indebtedness to the United Nations. In cases where it is established that United Nations funds were misappropriated by a staff member, the first course of action is to attempt to recover the amounts involved from any accrued salary and other emoluments, including terminal payments, of the staff member. Virtually all cases of full recovery are achieved in this manner.

5. In some cases, however, as noted by the Advisory Committee, the amounts recovered have been negligible because the total of the funds misappropriated far exceeded any sums to which the staff member might otherwise have been entitled. Where a staff member had separated from the United Nations and had received all final payments before the presumptive fraud was discovered, it has usually not been possible to recover any part of the misappropriated funds unless the individual was found to be employed by another organization of the United Nations system. In such circumstances, it has sometimes been possible to make arrangements with the other organization to effect recovery on behalf of the United Nations.

2. Pension benefits

6. Attempts by the Administration to obtain direct recovery of indebtedness from the pension entitlements of staff members were rejected in the past by the Administrative Tribunal of the United Nations, which held that the Regulations of the United Nations Joint Staff Pension Fund, promulgated by the General Assembly, precluded recovery of amounts due to the Organization from the pension benefits of separated staff. The Tribunal held, furthermore, that the Administration could not refuse to issue the documentation on the basis of which a staff member's pension benefits are processed, in an attempt to induce the former staff member to repay to the Organization the sums misappropriated. The Tribunal considered, however, that the Administration should not be left defenceless in such a case; it therefore suggested that the Administration and the Pension Fund should seek an appropriate solution to similar situations.

7. As a result, the Secretary-General amended the Administrative Instruction on the subject of the personnel payroll clearance action, to provide for the non-issuance of documents necessary for processing of pension benefits following separation from service. The relevant provisions of the amended Administrative Instruction 2/ read as follows:

"11. Staff members separating from service, in accordance with their contractual obligations to the United Nations are responsible for:

(a) Settling all indebtedness to the United Nations;

...

(d) Providing, in accordance with staff rule 104.4, the necessary documentary evidence as verification of the fulfilment of the responsibilities set out above.

"12. The Under-Secretary-General for Administration and Management may refuse to issue the P.35 form [Personnel Payroll Clearance Action form] or may delay its issuance until a staff member has satisfactorily fulfilled the requirements set out in paragraph 11 above.

"13. Staff are reminded that non-issuance of a P.35 form will prevent them from receiving their pension benefits since this form is required by the Pension Fund for the processing of those pension benefits. Staff are also reminded that failure to comply with the obligations set out in paragraph 11 above may result in the suspension of the separation procedure, which may delay any payments otherwise due to the staff member ..."

8. The Secretary-General believes that this procedure may encourage former staff members to settle their indebtedness to the Organization. However, it should be noted that the Tribunal has not yet had an occasion to examine this Instruction.

9. With regard to the possibility of directly attaching pension benefits as a method of recovering monies due from former staff members, the Secretary-General notes that such benefits are often seen as a social benefit to the family of the former staff member and that the benefit to the family will, of course, already have been reduced by the dismissal of the staff member for fraud. If such a provision were to be incorporated into the Pension Fund Regulations, the Secretary of the United Nations Joint Staff Pension Fund would have to determine both the existence and the amount of indebtedness and then determine the appropriate level of deductions from pension benefits. The Administrative Tribunal would consequently have to be given jurisdiction to hear appeals from such decisions, with the organization concerned being given the right to intervene to prove indebtedness.

10. It is doubtful that the costs of such a procedure should be borne by the Pension Fund; thus, the organization concerned would have to refund all costs of the exercise to the Pension Fund. Should the General Assembly desire to pursue this option, which requires amending the Pension Fund Regulations, the matter must first be referred by the General Assembly to the United Nations Joint Staff Pension Board, so that it can submit its views to the Assembly as required by the Regulations. 3/

B. External action

1. General comments

11. Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Member States "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Section 1 of the Convention on the Privileges and Immunities of the United Nations 4/ (the General Convention) provides that the United Nations shall possess juridical personality and shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings. These two provisions give the United Nations the capacity to sue in national courts.

2. Civil actions for recovery

12. Civil action for recovery of misappropriated funds requires proof of fraud by staff members. In this connection, a general problem arises if the alleged fraud consisted of a breach of internal United Nations regulations or rules (e.g., claiming and obtaining from the United Nations excessive or unwarranted reimbursement for medical expenses, education grant or income taxes). In such cases, in order to determine whether the staff members' acts were fraudulent, the national court would have to interpret and apply those provisions of the internal regulations and rules of the Organization allegedly violated by the staff member concerned.

13. However, in many legal systems, a national court may find difficulties in, or even a legal impediment to, applying internal rules of an intergovernmental organization which do not have the force of law in that national legal system, unless they are the few regulations promulgated pursuant to Headquarters Agreements to the express exclusion of local law. Furthermore, the submission of disputes involving internal regulations or rules to national courts could result in interpretations conflicting with those given by United Nations organs or inconsistent with the policies and interests of the Organization.

14. The difficulties outlined above would not exist where the act committed by the staff member would, independently of the United Nations regulations and rules, in itself constitute a wrong in the national jurisdiction (e.g, theft of or damage to United Nations property). From a practical viewpoint, effective recovery may be expected in such cases if the defendant has assets and is physically within the jurisdiction where the alleged fraud occurred or the evidence of wrongdoing is available, particularly if the fraudulent act was committed in collusion with non-United Nations staff in that jurisdiction, and therefore co-defendants are available against whom also recovery can be obtained.

15. Recovery becomes much more difficult if the staff member has left the country where the fraud was committed. In order for an action to be receivable, it would, in most cases, then be necessary to seek the assistance of the judicial authorities of the country where the staff member is currently residing. The effectiveness of the action for recovery would then depend, inter alia, on whether provision was made by agreement for judicial cooperation

between the country where the action was instituted and the country where the fraud occurred. In the absence of such agreement, a request for foreign judicial assistance would usually have to be transmitted through diplomatic channels and require the involvement of superior courts or high-level governmental officials of the countries concerned.

16. Moreover, the Organization may encounter considerable delay and expense in meeting the requirements for authentication and translation of relevant documents, interrogatories and annexed papers into the language of the requested court, and then translating that court's record of execution back into the official language of the original court. In addition to the delays involved, costs would be dramatically increased by the need for hiring the services of local counsel in at least two different countries and arranging for the presence of United Nations officials from Headquarters at the trial held away from the place where the fraud was committed.

17. In any case, the effectiveness of the action depends on the extent to which recovery of funds can be expected under the laws to be applied by the court. Proving the fraudulent conduct by means acceptable in the competent court can vary between countries. For instance, in certain States serious difficulties may exist in regard to producing evidence in the form of tapes, records of telephone conversations, or other evidence produced by mechanical means, so as to make such evidence virtually useless. In cases of fraud involving misappropriation of funds through banking transactions, national laws on banking secrecy and limitation of bank liability may also reduce the likelihood of adequate recovery by the United Nations.

18. In view of these difficulties, the likelihood of reasonably prompt recovery at an acceptable cost in cases involving the jurisdiction of different States is remote.

3. Criminal actions

19. Criminal jurisdiction has always been considered one of the essential attributes of sovereignty and, accordingly, criminal prosecution is a matter within the discretion of national criminal authorities. Those national authorities will evaluate the accusations of criminal action and decide whether the facts meet national requirements for continuing investigations and/or instituting prosecution.

20. The Secretary-General has on a number of occasions requested that national authorities investigate cases of alleged fraud against the United Nations, both by third parties and by former staff members. However, audit findings which lead to the dismissal of staff members are rarely supported by the type of evidence required under national law to secure criminal conviction, because the Secretary-General does not have the investigatory police powers needed to establish proof of guilt beyond reasonable doubt (such as subpoena power to obtain bank or financial records of the accused or his or her family, to obtain testimony on oath of witnesses, etc.). In addition, national authorities are often unwilling to undertake criminal action unless the amount of the fraud is significant.

21. In general, a criminal action may be successfully pursued only if the former staff member or any possible outside accomplice is physically present, at the time of the action, within the jurisdiction where the crime was committed. This requires, of course, that the fraud be discovered by the Organization before the individual leaves the country. The Secretary-General has undertaken to improve the internal control procedures that will enable immediate reporting to national criminal investigative agencies of cases of suspected fraud (see A/42/437 and A/47/510).

22. If the staff member concerned has left the jurisdiction where the fraud was committed before the prosecution commences, serious difficulties will arise because of the need for extradition of the accused. The laws of the extraditing State may prohibit extradition on a variety of grounds. 5/ It is noted that the United Nations has made considerable efforts to achieve more effective international cooperation in criminal matters, including the recommendation of the adoption by Member States of suitable international agreements to that purpose. 6/ However, despite existing measures for international assistance and cooperation, the delays in extradition procedures usually are considerable.

23. The courts of certain countries may entertain a prosecution even if the alleged crime was not committed within the jurisdiction (e.g., if the accused is residing within the jurisdiction). However, it will then be necessary to record evidence abroad or obtain the testimony of witnesses living in other countries. This can be a complex and time-consuming exercise that national authorities may be unwilling to undertake.

24. In summary, effective criminal prosecution of those who defraud the United Nations requires the full cooperation of the Member States and, to be viable, it usually requires that the accused, or at least his or her accomplices, be physically present at the time the prosecution is initiated in the State where the fraud was committed.

III. PROPOSALS FOR REFORM

25. As quoted in paragraph 2, the Advisory Committee, in its report (A/47/500, para. 53), requested that the Secretary-General explore the possibility of reaching agreements or arrangements with all Member States to enable the United Nations to pursue the prosecution of individuals for embezzlement of funds and to seek recovery of misappropriated funds.

Civil actions

26. The Secretary-General considers it possible to facilitate the task of civil action for recovery of embezzled funds by amending the Statute of the Administrative Tribunal of the United Nations to give it jurisdiction to judge claims submitted by the Organization against staff members, so that proceedings before national courts would be required only for enforcement of the judgement.

27. Under its Statute, the Administrative Tribunal has competence to entertain applications filed by staff members alleging a breach of their terms of employment. It would be possible for the General Assembly to amend the Statute of the Tribunal, to extend its jurisdiction as proposed herein.

28. This proposal, while respecting the sovereignty of Member States, has the advantage of minimizing the difficulties encountered by the Organization with external civil action. The potential conflicts of jurisdiction would be practically avoided, since national courts would be involved only for the enforcement of the judgement. There would also be no conflicts of law concerning aspects of substance, since the Administrative Tribunal would apply the internal law of the Organization and the enforcement authorities would not be expected to re-examine material aspects of the case. The high costs of producing evidence before national courts would be drastically reduced, and local counsel would be retained only to obtain enforcement of the judgement. Finally, this proposal would allow unrestricted examination of the entire circumstances of the cases, without affecting the privileges and immunities of the Organization.

29. A similar proposal has been submitted in the past to the General Assembly, in the second report presented by the Secretary-General on the feasibility of establishing a single administrative tribunal for the entire common system, pursuant to Assembly resolution 33/119 of 19 December 1978 (A/40/471). 7/

30. The General Assembly repeatedly postponed the consideration of that report to subsequent sessions; 8/ eventually, the Fifth Committee decided to close the discussion of this subject, in view of the opinion expressed by Member States that the entire question required further discussion (see document A/44/724 of 21 November 1989). Upon the recommendation of the Fifth Committee, the Assembly decided to retain, pending further consideration, the existing Statute of the Administrative Tribunal of the United Nations and requested the Secretary-General to revert to this matter, when appropriate (decision 44/413 of 22 November 1989).

31. The Secretary-General notes that no objection has been recorded with regard to the proposed extension of jurisdiction of the Administrative Tribunal and that the reason the General Assembly did not adopt the proposal at that time was the lack of consensus regarding the broader subject of unification of the administrative tribunals of the United Nations and the International Labour Organization. The Secretary-General believes that the particular issue of extending the jurisdiction of the Tribunal may be considered by the Assembly independently of any possible developments regarding the feasibility of establishing a single administrative tribunal for the entire common system.

32. As regards the enforcement of judgements rendered by the Administrative Tribunal under this new provision, the view was expressed, during consideration of that proposal, that the extension of jurisdiction "would not be fully useful to the United Nations until the recognition of Tribunal judgements by national courts could be achieved, possibly through a multilateral convention or a series of bilateral agreements with the Organization" (see A/43/704, para. 24).

33. The Secretary-General considers, however, that it may not be necessary that Member States sign a multilateral convention or a series of bilateral agreements with the Organization for the purpose of recognizing the judgements of the Tribunal. This could be achieved by a resolution of the General Assembly, recommending that Member States cooperate with the Organization in these matters and pass the necessary legislation to ensure recognition and enforcement of judgements of the Administrative Tribunal. 9/ Of course, each State's

legislation might specify the defences open to the party against whom the judgement of the Tribunal is sought to be enforced. However, even if automatic full recognition is not possible, it may be that a number of jurisdictions will recognize, prima facie, the validity of such judgements or the evidence produced before the Tribunal. If the General Assembly accepts this approach in principle, it may wish to request the Secretary-General to submit concrete proposals in this connection at a subsequent session, since such proposed amendments are normally submitted to the Tribunal for its comments prior to formal submission to the Assembly.

Criminal actions

34. In relation to criminal action against former staff members, the Secretary-General notes that the aforementioned difficulties derive ultimately from the existence of different national systems of criminal law and the related standards of proof required for a criminal conviction. In spite of several attempts at harmonizing national legislation and improving cooperation among States in the prosecution of criminals, major problems still exist as these matters appertain very closely to national sovereignty. It would not be reasonable to propose the creation of a centralized criminal court to deal with criminal acts against the United Nations, or to expect Member States to negotiate an international convention with this limited scope.

35. One possible measure could be the adoption by the General Assembly of a resolution recommending that Member States pass legislation making fraud against the United Nations committed by their nationals or by persons domiciled in the territory of such Member States punishable by appropriate penalties and subject to the jurisdiction of national courts. Such a resolution could also recommend that Member States extend to the Organization and to other Member States all the necessary assistance in order to secure criminal prosecution of individuals defrauding the United Nations. If the General Assembly wishes to examine this option further, the Secretary-General could be requested to prepare a report contemplating specific proposals for such an Assembly resolution.

Notes

1/ A/47/500.

2/ ST/AI/155/Rev.2.

3/ Article 49 of the Regulations of the United Nations Joint Staff Pension Fund (JSPB/G.4/Rev.14) provides as follows:

"(a) The Board may recommend amendments to these Regulations to the General Assembly, which may amend these Regulations after consultation with the Board."

4/ General Assembly resolution 22 (I).

5/ I.e., if the courts of the extraditing State consider themselves competent for judging the criminal action; if there is no extradition treaty in force with the requesting country; if the penalty provided for in the laws of

the requesting country is considered excessive, inhuman or unacceptable by the extraditing country; if the accused is a citizen, or consort or parent of a citizen of the extraditing country.

6/ For example, the adoption, by the General Assembly, on 14 December 1990, of a Model Treaty on Extradition (resolution 45/116), a Model Treaty on Mutual Assistance in Criminal Matters (resolution 45/117), a Model Treaty on the Transfer of Proceedings in Criminal Matters (resolution 45/118) and a Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (resolution 45/119).

7/ The first report of the Secretary-General was entitled "Feasibility of establishing a single administrative tribunal" (A/C.5/39/7 and Corr.1). On the recommendation of the Fifth Committee (A/39/842, para. 12), the General Assembly decided to defer consideration of that report to its fortieth session (decision 39/450 of 18 December 1984).

8/ Decision 40/465 of 18 December 1985, decision 41/447 of 5 December 1986, resolution 42/217 of 21 December 1987 and decision 43/452 of 21 December 1988.

9/ General Assembly resolution 92 (I) of 7 December 1946 on the protection of the United Nations name and emblem, which contains the recommendation that Member States adopt such legislation as may be necessary to prevent the unauthorized use of the name and emblem of the United Nations resulted in appropriate legislative measures in a number of Member States (see Yearbook of the International Law Commission, 1967, (United Nations publication, Sales No. E.68.V.2), vol. II, p. 235).